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Before the
Federal Communications Commission
Washington, D.C. 20554

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In re Applications of)	MM Docket No. 88-577
)	
LIBERTY PRODUCTIONS,)	File No. BPH-870831MI
A LIMITED PARTNERSHIP)	
)	
Et. Al.)	
)	
For Construction Permit for		
New FM Channel 243C3		
Biltmore Forest, North Carolina		

To: The Commission

LIBERTY'S MEMORANDUM IN SUPPORT OF
THE JOINT REQUEST FOR APPROVAL OF SETTLEMENT

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its Memorandum in support of the Joint Request for Approval of Settlement, as follows:

1. As stated in the Joint Request, the Settlement Agreement between Liberty and Biltmore Forest Broadcasting FM, Inc. ("BFB") is conditioned upon:

(a) the dismissal of Liberty's application with prejudice, but without penalty to Liberty, and the refund of Liberty's downpayment in full;

(b) the payment by BFB of Liberty's reasonable and prudent expenses in prosecuting its application and in the joint interim operation of the Biltmore Forest station;

(c) the entry into a consulting agreement between BFB and Liberty's general partner during the initial start-up of the Biltmore Forest station; and

(d) the designation of BFB as the winner of the auction by virtue of its making the high bid in Round 12 of Auction No. 25.

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Two elements of the agreement are deserving of special comment. First, the settlement is specifically conditioned upon: (a) no penalty being assessed against Liberty for voluntarily dismissing its application and (b) refund of Liberty's down payment in full. Second, the settlement is specifically conditioned upon the designation of BFB as the winner of the auction by virtue of its second-highest bid in Auction No. 25.

I. Dismissal of Liberty's Application Without Penalty.

2. The settlement is specifically conditioned upon Liberty's application being dismissed without penalty to Liberty and its down payment being refunded in full by the Commission. As discussed below, the Commission's Rules do not require the imposition of a penalty nor do they preclude the refund of Liberty's downpayment under the circumstances presented by this case. Nor is any penalty otherwise warranted or appropriate. Furthermore, were a waiver of any rule or policy required to allow for the approval of the proposed settlement, more than adequate basis for the grant of such a waiver is present.

3. Section 1.2109(c) of the Rules requires a "defaulting" winning bidder to pay a specified penalty. However, the Rule does not embrace or contemplate a circumstance in which the dismissal of the winning application is being approved by the Commission pursuant to a settlement. Accordingly, Section 1.2109(c) does not require the assessment of any penalty in this case nor does it or any other provision of the Rules preclude

the refund of Liberty's down payment and, thus, the Commission's Rules do not present any impediment to the approval of the settlement.

4. Likewise, the assessment of a penalty under the current circumstances would not otherwise be warranted or appropriate. Liberty has not "defaulted" on any obligation; it has met every obligation to date and stands ready to remit final payment of its winning bid. However, in the interests of expediting the resolution of this proceeding, Liberty is voluntarily agreeing to dismiss its application and relinquish its claim on the construction permit. Upon a finding that the proposed settlement would serve the public interest and approval of the voluntary dismissal of Liberty's application, the Commission would have no legitimate basis for assessing any penalty or retaining Liberty's down payment. Rather, the Commission will have relieved Liberty of any financial obligation by approving the settlement.

5. Should the Commission disagree with the proposition that neither Section 1.2109(c) nor any other Rule requires the imposition of a penalty or precludes return of Liberty's down payment, Liberty hereby requests a waiver of the Rules to the extent necessary to permit the approval of the proposed settlement. Applying the well-settled principles of WAIT Radio v. FCC, 418 F2d 1153 (DC Cir 1969), the grounds justifying any needed waiver are ample.

6. The Commission has repeatedly encouraged the parties to settle these cases. Rebecca Radio of Marco, 4 FCC Rcd 830 (1989). In extending the Commission's auction authority to broadcast authorizations Congress made explicit its intent that negotiated settlements remained the preferred means of resolving mutual exclusivity. See: 47 U.S.C. 309 (j)(6)(E) ("Nothing in [the statute authorizing auctions] shall be construed to relieve the Commission of the obligation in public interest to use negotiation and other means in order to avoid mutual exclusivity in application and licensing procedures."). It also required the Commission to waive certain of its Rules on a temporary basis in order to encourage settlement. See also 47 U.S.C. 309(1)(3). While the present settlement proposal is only partial, it serves to simplify all subsequent proceedings in the case. Given the twelve and a half-year history of this case, anything which will expedite and simplify the case is to be desired.

7. Moreover, the penalty payment provisions were designed to discourage insincere bidding and assure the integrity of the bidding process in each auction. Amendment of Part 1 of the Rules Competitive Bidding Procedures, 13 FCC Rcd 374 (1997); Second Report and Order, 9 FCC Rcd 2348 at para. 197. Here it is clear that Liberty placed its bids in good faith with every intention of fulfilling its obligation to pay the bid amount. Indeed, it has met every obligation to date and remains ready to remit payment of the balance of its winning bid. Accordingly, grant of a waiver here would do no violence to the purpose of any Rule or

policy and there exists no legitimate basis for precluding Liberty for stepping aside in the interests of expediting the resolution of the proceeding, much less penalizing it for such action.

8. The diminution in the amount of funds to be received by the Treasury should not be determinative of the approval of any needed waiver. Congress has forbidden the Commission from basing "a finding of public interest, convenience and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding". 47 USC 309 (j)(7)

9. In considering any needed waiver, the Commission's policy in dealing with the C Block PCS licenses is also instructive. There, numerous auction winners were threatened with default due to the high bids they had placed and the subsequent lack of available financing. Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16 (1997). Among other relief granted, the Commission offered licensees amnesty for their debts if they turned in their licenses for reauction. The parties electing the amnesty option were not declared in default and, thus, were not charged with any penalty payments. That proceeding establishes the principle that the Commission, for good and valuable reasons, may relieve a winning bidder of its obligation to pay its bid and may thus negate any "default" (with

attendant consequences) which might otherwise arise under the rules.

10. The partial settlement of this difficult and long-standing case certainly represents at least as valid a ground for relieving Liberty of any penalty as the grounds supporting the C Block amnesty. Unlike the C Block licensees whose own overbidding made it impossible for them to meet their commitments, Liberty bid prudently and had every intention and capability of paying its winning bid. Although it remains willing and able to pay its winning bid, it has agreed to voluntarily step aside in order to expedite the resolution of this case. Such steps should be encouraged rather than penalized. Accordingly, a waiver of any rule necessary to permit approval of the settlement and the return Liberty's downpayment in full would be entirely consistent with the Commission's C Block orders.

11. As set forth in the Joint Request, this case is one of only two comparative hearing cases left to be resolved. No other cases coming before the Commission will ever bear the baggage of history that these cases bear. The Commission itself has recognized that the applicants here have borne the burden of long comparative hearing battles, unlike new applicants for auctioned services. If there is any way that the Commission can do equity to the unfortunate applicants caught by the historical quirk of transitioning to auction in mid-stream, it should do so.

II. Designation of BFB as the Auction Winner.

12. As noted, the settlement is specifically conditioned upon the designation of BFB as the winning bidder in Auction No. 25. The Commission's First Report and Order in Docket 97-234, 13 FCC Rcd. 15920 (1998) ("First Report and Order") considered the question of how licenses would be awarded post-auction if the winning bidder defaulted or was disqualified. The Commission stated that for pre-July 1st applicants "we believe that offering any construction permit on which the winning defaults to the next highest bidders, rather than re-auctioning the construction permit to new applicants, would comport with statutory requirements and would be more expeditious." Id. at Para. 86. Although the present circumstances do not involve a default or disqualification, nothing precludes the Commission from following the same principle and designating BFB the auction winner, based upon its status as the second highest bidder.

13. The settlement is conditioned also on BFB being declared the winner "by virtue of its making the high bid in Round 12 of Auction No. 25", which was the last round in which BFB bid against any applicant other than Liberty. While Section 1.2109(b) sets forth the procedure to be followed in the event of a default or disqualification, those procedures do not apply here, where there has been neither default or disqualification. Accordingly, nothing in the Commission's Rules precludes the designation of BFB as the winning bidder by virtue of its high bid in Round 12.

14. The only apparent hurdle to approving this element of the settlement would be the diminution of funds that would be due to the Treasury were BFB to be declared the auction winner by virtue of its Round 12 bid. However, Congress has forbidden the Commission from considering the impact upon any anticipated revenue to the Treasury in making public interest determinations relative to auction procedures. See: 47 USC 309 (j)(7) ("[I]n prescribing regulations pursuant to Paragraph 4(A) of this subsection, the Commission may not base a finding of public interest, convenience and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection."). Accordingly, the fact that approval of the settlement as proposed will result in a diminution of revenue to the Treasury may not be considered in determining whether approval would serve the public interest.

15. Nevertheless, to extent necessary to permit approval of the settlement, the Commission is hereby requested to waive any rule or policy that may be required to be waived in order to permit the designation of BFB as the winning bidder by virtue of its making the high bid in Round 12 of Auction No. 25. Such a waiver would be warranted for the same reasons discussed above (at paras. 5-10). The case is unique, as one of only two remaining comparative cases. Both Congress and the Commission have encouraged settlement of these proceedings. Indeed, in expanding the Commission's auction authority to include broadcast licenses, Congress mandated that the Commission waive certain

provisions of its rules on a temporary basis in order to facilitate settlement. 47 USC 309(1)(3). While the mandated waiver was temporary, it reflects Congressional intent that settlement is to be favored. Furthermore, Congress has specifically emphasized the Commission's ongoing responsibility to attempt to resolve mutual exclusivity through negotiated settlement in adopting auction procedures. See: 47 U.S.C. 309 (j)(6)(E) Furthermore, Congress has forbidden any consideration by the Commission of any "expectation of Federal revenues" in determining whether the proposed settlement would serve the public interest.

16. In summary, the Commission should approve the settlement as proposed and designate BFB the auction winner on the basis of its high bid in Round 12. There exists no applicable Rule or policy which would preclude such action. The resulting diminution in the amount of funds received by the Treasury is not a factor which may properly be considered. Significantly, the Commission has determined that authorizations sought by pre-July 1, 1997 applications were not required to be awarded by competitive bidding. First Report and Order at paras. 29-30 (1998) Accordingly, Congress could have had no expectation that the award of any authorization in these proceedings would result in any proceeds to the Treasury. This fact affords the Commission considerable discretion to fashion a remedy in this case, even where an auction has already occurred. To the extent a waiver would be required, a more than ample basis exists to support such

a waiver, as has been demonstrated. 1/

WEREFORE, in light of the foregoing and for the reasons stated in the Joint Request, the Joint Request should be GRANTED and the partial settlement APPROVED, as proposed.

Respectfully Submitted

LIBERTY PRODUCTIONS,
A LIMITED PARTNERSHIP

By 

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November 17, 2000

1. BFB has argued that Liberty's short form application was required to be dismissed as erroneously accepted for filing on the basis that it failed to include a certification regarding family media interests, citing Public Notice DA 99-1346, released July 9, 1999. Liberty disputes BFB's contentions and does not view their resolution as necessary to permit the approval of the settlement, as proposed. However, were the Commission to find BFB's argument compelling, Liberty does not intend to interpose any objection as to the particular rationale upon which the Commission elects to rely in dismissing its application, so long as such dismissal is undertaken in the context of approval of the proposed settlement and is without penalty to Liberty.

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 17th
day of November, 2000, served a copy of the foregoing Memorandum
in Support of Joint Request by First Class mail, postage prepaid
upon the following:

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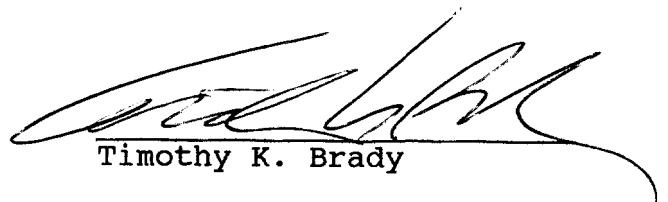
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